Supreme Court, U.S.
FILED

021298 MAR 3 2003

No. 03-___

In the Supreme Court of the United States

JOHN GOUDIE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a case in which the jury was not instructed on an essential element of the crime which was disputed at trial, did the Eleventh Circuit's harmless error decision conflict with a recent decision of this Court, and decisions in other Circuits?

2. Whether the sentence called for by the Sentencing Guidelines in this case is so disproportionate as to conflict with the requirements of 28 U.S.C. §§ 991-998 (2000), the act of Congress pursuant to which the United States Sentencing Commission promulgated the guidelines.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 14.1(b), petitioner states that all parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Goudie respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eleventh Circuit decision from which this appeal is taken, No. 99-10274 (11th Cir. July 19, 2002), is unreported. It is reprinted in Pet. App. at 1a-4a. The district court's Order For Motion Granting Bond Pending Appeal is also attached. No. 97-582-CR-LENARD (S.D. Fla. May 17, 1999)(Pet. App., *infra*, 7a-11a).

JURISDICTION

The Judgment of the court of appeals was entered on July 19, 2002. Pet. App. 1a. A timely petition for rehearing *en banc* was denied on December 10, 2002. Pet.

App. 5a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the Constitution provides in relevant part: "[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...."

The relevant provisions of 28 U.S.C. §§ 991-998 (2000) are reproduced in pertinent part at Pet. App., *infra* 12a.

STATEMENT OF THE CASE

Mr. Goudie was a minor defendant in a major case. He was one of eight defendants named in a twenty-eight count indictment charging a scheme to obtain mortgage loans by fraud and to launder the proceeds of those loans. The indictment alleged violations of the mail fraud, wire fraud, bank fraud, money laundering, and conspiracy statutes. Goudie was named in four counts. Three defendants went to trial. They were Jose Macia and Roberto de Leon, the main defendants, and petitioner John Goudie.

The government proved during a ten-week trial that defendants Jose Macia and Roberto de Leon had engaged in a scheme to obtain numerous mortgage loans by fraud. The total amount of the fraudulent loans exceeded $8 million. Most of the loans were obtained in connection with a failing real estate development project run by the defendant Macia. (R38-682-4299; R9-653-170-72). Many of the loans were to straw buyers engaging in sham purchases of individual units of the real estate project. (R24-668-2295, 2317; R29-673-3085-86, 3107). The government proved that the loans were issued as a

result of numerous false statements, the materiality of most of which was undisputed. (*e.g.* R16-660-1285-90; R22-666-1919-23;R15-659-1098-1102).

The government's cooperating co-conspirator did not name Mr. Goudie as a member of the conspiracy in his trial testimony. (R17-661-1407; R19-663-1599). The government endeavored to connect Mr. Goudie to only one loan: a $600,000 loan issued to Mr. Humberto Hernandez ("Hernandez") by Prime Mortgage Investors ("Prime"), a non-bank lending company. There was no *testimony* at trial about Mr. Goudie's involvement in this loan. Mr. Goudie's connection to it was supported by a single document called a Verification of Mortgage ("V.O.M."), which was found in the lender's files. (R33-677-3628-29, 3631-32; R40-684-4490). The V.O.M. was signed "John Goudie," and it purported to verify that Hernandez owed Goudie $100,000 on a mortgage loan Goudie had earlier made to Hernandez. (R33-677-3631-32). The government's theory was that the V.O.M. was false in that no $100,000 loan had been made by Goudie to Hernandez. For purposes of this petition,[1] we do not dispute that the V.O.M. was false.

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[1] Although the government took handwriting exemplars from Mr. Goudie pre-trial, it did not use them. It did not call a handwriting expert to testify that Mr. Goudie had signed the V.O.M. It did not call any witness to testify that Mr. Goudie signed the V.O.M. Instead, it asked the jury to compare the signature on the V.O.M. to the signature on John Goudie's drivers license. (R48-692-5954, 6024-25)

The government introduced no direct evidence that the V.O.M. was false; *i.e.*, it introduced no direct evidence that Mr. Goudie had made no loan and held no mortgage. It argued instead that the absence of a loan could be inferred from the fact that no withdrawal of $100,000 appeared in the records of the one Goudie bank account which was in evidence. The Eleventh Circuit rejected, without explanation, Mr. Goudie's

There were numerous other false statements made by other defendants in connection with the $600,000 loan to Hernandez. (*e.g.* R15-659-1097-98; R22-666-1914-18). The materiality of these other false statements was undisputed. But Mr. Goudie's lawyer disputed the materiality of the statement Goudie had allegedly made: the statement in the V.O.M. that Hernandez owed Goudie $100,000. (*e.g.* R47-691-5956). That statement – if false – falsely inflated the borrower's *liabilities*. Inflated *assets* may induce a lender to make a loan. But, logically, inflated *liabilities* do not tend to induce lenders to make loans. In fact, numerous lenders testified at trial that liabilities tend to make lenders *withhold* loans. (e.g., R15-659-1107-08, 1132, 1156; R16-660-1269-70). And, Goudie's counsel pointed out in summation that a V.O.M. falsely reporting another *liability* would not induce a lender to make a loan, saying to the jury "[l]oans and mortgages count *against* you." (R47-691-5956) (emphasis added).

The government tried to cure this problem through testimony by a witness from Prime responsible for quality control. The witness opined, counterintuitively, that the existence of a pre-existing loan would reduce the borrower's "payment shock" from the new loan, and would thus be a fact supporting the new loan. (R-677-3633-34) But this testimony was impeached by Goudie's counsel on cross examination. He brought out that the Prime witness and the FBI agent had gone over the loan file in advance of trial, and had come up with a list of five false

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challenge to the sufficiency of the evidence against him. We do not seek certiorari from that part of the Eleventh Circuit's opinion.

statements that mattered. The V.O.M. was not one of them. (R34-678-3711-12).[2]

Mr. Goudie's counsel requested an instruction that the materiality of a false statement is an essential element of the crimes of mail fraud, wire fraud, and bank fraud. (R46-690-5568-69). This instruction would have applied to every count on which Goudie was charged and convicted. Mail fraud, wire fraud, and bank fraud were the predicate offenses for all of the offenses, including the conspiracy and money laundering offenses, with which Goudie was charged. (R46-690-5568-69).[3]

The trial judge understandably declined to give that instruction because the Eleventh Circuit had recently held in *United States v. Neder*, 136 F.3d 1459 (11th Cir. 1998) ("Neder I") that materiality was *not* an element of either mail fraud, wire fraud, or bank fraud. *Id.* at 1463. Consequently, the jury was never instructed on materiality; and it never decided whether the statement in the V.O.M. was *immaterial*, as Goudie's counsel contended, or *material*, as the government contended.

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[2] Moreover, the overall evidence against Goudie was weak, at best. The prosecutor was heard to say in summation, "[y]ou haven't heard that much about Mr. Goudie. He sat here for two months, but you didn't hear much about him." (R47-691-5812). And the trial judge stated, in granting Mr. Goudie bond on appeal, that "there is a substantial issue of law as to the sufficiency of the evidence of Goudie's guilt." (Order Granting Motion for Bond at 3, Pet. App., *infra* at 9a).

[3] The conspiracy to commit fraud count also alleged that one of the objects of the conspiracy was to violate 18 U.S.C. § 1014. But the government did not contend Goudie conspired to violate § 1014. Section 1014 applies to false statements to federally insured banks and Prime was not a federal insured bank.

Following the conviction but before sentencing, this Court granted certiorari in *Neder*. The grant of certiorari threw the correctness of the 11th Circuit's decision in *Neder* in doubt. The trial judge, accordingly, decided to grant Goudie bond pending appeal because, as to *him*, the failure to give a materiality instruction *might* turn out to be reversible error, depending on how this Court decided *Neder*. (R7-698-4; Order Granting Bond at 3, Pet. App. *infra*, at 9a).

Thus, the trial judge, who presided over the trial and knew the record, indicated strongly in her decision on bond pending appeal that materiality was an important issue *as to Goudie*. She released Goudie on bond – but did not release Macia, who had also requested a materiality instruction – because Goudie raised a substantial issue of law or fact which could set aside each count on which he was convicted. She identified the substantial issue of law as her failure to submit the *materiality* issue to the jury. Focusing on the proof as to *Goudie,* she wrote:

> The Court emphasizes that this finding [*i.e.*, that there was a substantial issue raised by his appeal] is *specific to the particular case against John Goudie* and the *particular evidence presented demonstrating Goudie's guilt.* The Court finds, however, that *there is a substantial issue of law as to the sufficiency of the evidence of Goudie's guilt.* Thus, the Court finds this issue is not frivolous and is a close question that could well be decided the other way. [R7-698-4; Order Granting Bond at 4; Pet. App., *infra* at 10a.]

Following the setting of bond and before Goudie's appeal brief before the Eleventh Circuit was due, this

Court reversed the Eleventh Circuit's decision in *Neder*, and held that materiality was an essential element of mail fraud, wire fraud, and bank fraud. *See*, *Neder v. United States*, 527 U.S. 1 (1999). Goudie thus asked the Eleventh Circuit to reverse his conviction and remand for a new trial so that a properly instructed jury could decide whether or not the false statement he was accused of making was material.

The Eleventh Circuit rejected Mr. Goudie's appeal in a brief *per curiam* opinion saying, with respect to the failure to instruct on materiality, only that "[t]his error, if error, was harmless." No. 99-10274 (11th Cir. July 17 2002). (Pet. App., *infra* at 2a)

Mr. Goudie was given a five-year jail sentence under the Sentencing Guidelines. This was in spite of the fact that there was no contention that he had received any money from any of the loans, and no evidence of his involvement in any loans other than the Hernandez loan. His only involvement in the money laundering counts was that $59,000 was run through a bank account of a defunct corporation in which Goudie was a signatory and had a controlling interest. (R37-681-4197-99) There was no testimony that Mr. Goudie had been told that this $59,000 constituted proceeds of a crime.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT AND DECISIONS IN OTHER CIRCUITS

The trial judge failed to instruct the jury on an essential element of the crime. The issue was *disputed* at trial; and there was evidence and argument *rationally* supporting the defendant's position that the element had

not been proved. The Court of Appeals affirmed his conviction anyway, holding, without the slightest explanation, discussion or analysis, that the error was harmless. In so doing, the Court of Appeals committed error of the clearest sort.

This Court held recently in *Neder v. United States*, 527 U.S. 1 (1999) that the erroneous failure to instruct the jury on an essential element of the crime is not one of those errors that can never be harmless. But the Court also held that if the element was *disputed* at trial and the defendant's position had a *rational* basis, then the error is never harmless.

A defendant has a right to have his guilt or innocence decided by a jury, not by three federal judges. The harmless error doctrine is an important part of our jurisprudence. But if Courts of Appeals can use the doctrine as casually and erroneously as the court of appeals did in this case, it threatens to nullify the defendant's right to a trial by jury.

This is not just an individual case of injustice. This Court's *Neder* decision is recent. The Eleventh Circuit's decision is plainly inconsistent with it. If courts can use the harmless error doctrine as the Eleventh Circuit did in this case, it will undermine defendants' jury right and it will undermine *Neder*. Petitioner Goudie respectfully asks this Court to grant certiorari, and reverse – summarily if appropriate – to make clear that courts of appeals must adhere to the limits on the harmless error doctrine, articulated in *Neder* so as not to intrude on the right to jury trial.

A grant of certiorari is particularly appropriate due to differences in the approach to harmless error analysis which exist among the circuits.

A. The Decision of the Court of Appeals Conflicts with a Recent Decision of this Court

In *Neder v. United States*, 527 U.S. 1 (1999), this Court held that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes." *Neder*, 527 U.S. at 25. The Court also held that in limited circumstances, such a failure could be harmless. *Id.* at 18-19.

The Court held that failure to instruct the jury on an essential element of the defense is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id* at 18. The Court explained that "where an omitted element is supported by *uncontroverted* evidence, this approach [i.e. application of the harmless error doctrine] reaches an appropriate balance ...." *Id.* (emphasis added).

The Court focused the harmless error inquiry on whether the element was *disputed* and "whether the record contains evidence that could rationally lead to a contrary finding," on materiality. *Id.* at 19. Thus, the Court emphasized that where a "defendant *contested* the omitted element and raised *evidence sufficient to support a contrary finding*," the error would not be harmless. *Id.* (emphasis added)[4]

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[4] The false statement at issue in *Neder's* harmless error discussion had to do with a tax evasion count – not the mail, wire and bank fraud counts. The taxpayer had failed to report $5 million of income on his tax return. There had been no contention at trial that this false statement was immaterial, and there was no such contention on appeal. This Court thus held the failure to instruct on materiality, in connection with the tax evasion count, to be harmless. *Id.* at 19.

Under this Court's decision in *Neder*, the failure to instruct on materiality in this case cannot possibly be viewed as harmless. Here, the materiality of the false statement was *disputed*. Goudie's counsel cross examined the witness from the lending institution on this issue, and argued in summation that the statement was not material. See *supra* at 4. And there was *evidence rationally supporting the defendant's position*. The false statement overstated the loan applicant's *liabilities* – a fact making the loan applicant *less* appealing as a borrower, according to the testimony of numerous witnesses. R15-659-1107-08, 1132, 1156; R16-660-1269-70. To be sure, a government witness claimed the over-statement of liabilities was material. But her testimony was impeached. (R34-678-3711-12). A jury could rationally have found the witness not to be credible and the false statement not material. Under this Court's *Neder* decision, that ends this inquiry.

The right at issue in this case, and in *Neder*, is an important one: it is the right of a defendant to have his guilt or innocence decided by a jury, and not by three federal judges. The harmless error doctrine is an important part of our jurisprudence. But this Court did not intend that it be used as a way for Court of Appeals judges to substitute their evaluation of the evidence for that of the jury.

Neder contemplates that harmless error analysis will involve careful analysis. *See Neder*, 527 U.S. at 19 ("safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record.") Here, the Court of Appeals engaged in no analysis at all. It just said "[t]he error, if error, was harmless." The trial court, on the contrary, expressly distinguished between the "particular facts" as to Goudie and the particular facts as to Macia, holding the failure to

instruct the jury on materiality was potentially reversible error as to Goudie, but not as to Macia.

Courts must do more than pay lip service to the harmless error doctrine. Otherwise it can be used to deprive a defendant of his jury right. Petitioner Goudie respectfully asks that certiorari be granted and the Eleventh Circuit's decision reversed either summarily or after plenary consideration

B. The Eleventh Circuit's and the Second Circuit's Harmless Error Decisions Conflict With The Decisions in Other Circuits

The Eleventh Circuit did not explain its harmless error conclusion in this case. However, in order to reach the result it did, the Eleventh Circuit must have weighed the competing evidence and arguments on the issue of materiality and found the government's position sufficiently convincing. This is consistent with the Second Circuit's approach in *United States v. Jackson*, 196 F. 3d 383 (2nd Cir. 1999). The Second Circuit utilized a two-part test, first determining if the evidence in the record could lead to a finding for the defendant as to the omitted element, and then added a second inquiry; whether the verdict, absent the error, would have been the same. *Id.* at 388.

In effect, this Second Circuit test requires an appellate court to undertake "the task of pretending that the jury had been properly charged, and pretending that the jury had heard all of the evidence, and then deciding what, under such circumstances, the jury would have done." Kathryn Keneally, *White Collar Crime: More Harm Done by the Harmless Error Rule*, 24 Champion 49, 51 (2001).

The Fourth Circuit has noted that the Second Circuits' approach conflicts with this Court's decision in *Neder*, and the rule in the majority of Circuits, stating "[t]he Second Circuit has construed *Neder* to require an additional step ....We do not believe that *Neder* requires this additional inquiry." *U.S. v. Brown*, 202 F.3d at 701 n. 19.

Indeed, the decision below and the Second Circuits' approach do conflict with the *Neder* test as applied in other Circuits. For example, in *United States v. Prigmore*, 243 F. 3d 1 (1st Cir. 2001), the trial court had failed to instruct the jury on the meaning of an underlying statute. In applying *Neder's* harmless error test, the court of appeals first focused on whether the meaning of this statute was disputed at trial. The court of appeals found that it had been disputed.[5] Second, the court focused on whether the defendant had a rational support for his position. The court of appeals concluded that the government's evidence was strong, but the court found that the competing evidence proffered by the defendant was "not inherently incredible", which effectively ended the inquiry. The court did not weigh the strength of the competing positions. *Id.*[6]

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[5] The court stated that "[g]iven *Neder's* repeated emphasis on the 'uncontested' nature of the evidence of materiality in that case, the contested nature of the testing evidence in this case might well suffice to distinguish it from *Neder* in and of itself." *Id.* at 22 (citations omitted).

[6] Additionally, the statement of the trial court that the motion for a judgment of acquittal was a "close call" impressed the court. *Id.* In this case, too, the trial judge, said that there was a "substantial issue" as to the "sufficiency" of defendant Goudie's guilt. (Order Granting Motion For Bond at 4; Pet. App., *infra* at 9a).

The Fourth Circuit, in *United States v. Brown*, 202 F. 3d 691, 701 (4th Cir. 2000), applied the same test. There the trial judge had failed to instruct the jury on an essential element of this crime.[7] The court first focused on whether the defendant had disputed the element at trial, and found that he had. Then the court focused on whether there was "a basis in the record for the jury to have rationally disbelieved the testimony of any of the Government's witnesses" on the disputed issue. *Id.* at 702. The court concluded that there was. That ended the matter.

The court did not weigh the strength of the competing positions. The court specifically declined to decide whether the jury did or would have believed or disbelieved any of these witness, and vacated the conviction. *See also, United States v. Mora*, No. 00-4328, 2001 U.S. App. LEXIS 17095, at *17 (4th Cir. July 31, 2001)(vacating conviction for failure to give materiality instruction, stating that "if the element was generally contested, and there is evidence upon which a jury could have reached a contrary finding, the error was not harmless."); *United States v. Walls*, 225 F.3d 858, 867 (7th Cir. 2000)(finding that despite evidence such that a jury could have found omitted element satisfied, even slight evidence in defendant's favor was sufficient to find error, and reversing conviction).[8]

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[7] In *Brown*, the error was the court's failure to give an instruction concerning the need to find specific violations that constituted a continuing criminal enterprise.

[8] *See also United States v. Corrigan*, No. 98-4075, 2000 U.S. App. LEXIS 17421 (4th Cir. July 19, 2000); *United States v. McCulligan*, 256 F.3d 97 (3rd Cir. 2001); *Ferguson v. Bruton*, 217 F.3d 983 (8th Cir. 2000); *U.S. v. Nordby*, 225 F.3d 1053, 1060 (9th Cir. 2000).

The grant of certiorari would clarify the correct harmless error approach and make the approach uniform among the circuits.

II. THE SENTENCING GUIDELINES LED TO A SENTENCE IN THIS CASE THAT VIOLATED THE STATUTE UNDER WHICH THE GUIDELINES WERE PROMULGATED

The money laundering Guidelines promulgated by the Federal Sentencing Commission resulted in Mr. Goudie's receipt of a 60-month term of imprisonment. Applying these Guidelines, the district judge determined that Mr. Goudie had a total offense level of 25. This is the same offense level that would apply to a criminal with the same record as Mr. Goudie who walked into a bank, stole $19 million, and pocketed the entire amount for his own use. *Federal Sentencing Guidelines* § 2B1.1 (1998). It is also the same level that applies to *voluntary* manslaughter (*id.*, § 2A1.3), and is a greater offense level than is applicable to attempted murder where the victim suffered bodily injury (other than first degree) (*id.*, §§ 2A2.1(a)(2), (b)(1)(B), and burglary of a residence where the defendant steals between $2.5 million and $5 million (*id.*, § 2B2.1).

Here, there was no contention that Goudie received any money at all out of any of the loans. There is no system of proportionate sentencing that would send Goudie to jail for the same period of time as a bank robber who got away with $18 million or an attempted murderer who inflicts serious bodily injury on his victim.

The disproportionate sentence resulted from 1) the money laundering guidelines (which apply equally to laundering drug money and to laundering the proceeds of other less serious crimes as well), and 2) the fact that the

sentencing guidelines give greater weight to the amount of money involved in a crime than to the defendant's individual role and conduct in it.

It was the Guidelines, not some aberrational application of them by this trial judge, that caused the result. Indeed, the Sentencing Commission itself has recognized that "the broad and inconsistent use of money laundering charges, coupled with an inflexible, arbitrarily determined guideline structure, is resulting in *substantial unwarranted disparity and disproportionality* in the sentencing of money laundering conduct." U.S. Sentencing Commission, *Report to Congress: Sentencing Policy for Money Laundering Offenses, including Comments on Department of Justice Report,* Sept. 18, 1997 at 9.

When the guidelines reach a result contrary to a Congressional mandate, they are not within the allowable scope of authority of the Commission, and are not valid as applied. As applied to this case, the Guidelines thus violate the statute under which the Sentencing Commission promulgated the Guidelines.[9]

The statute creating the Sentencing Commission provided that one of the purposes of the Commission was to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct ...." 28 U.S.C. § 991(b)(1)(B). In fact, Congress specifically provided that

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[9] To be clear, Petitioner is not invoking a challenge to the constitutionality of the sentencing laws, but rather, asserts that as a matter of law, the Sentencing Commission acted in a manner inconsistent with its enabling statutory authority in promulgating such disproportionate and inconsistent guidelines.

the Commission "shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentencing disparities." 28 U.S.C. § 994(f).

This Court has recognized that the discretion of the Sentencing Commission "must bow to the specific directives of Congress." *United States v. LaBonte*, 520 U.S. 751, 757 (1997). Therefore, "when Congress and the Commission disagree on matters of sentencing policy, Congress trumps ....Where the Guidelines and a statute conflict, the statute (an act of Congress) controls." *United States v. Gaines*, 122 F. 3d 324, 330 (6th Cir. 1997); *see also*, *United States v. Palmer*, 183 F. 3d 1014, 1017 (9th Cir. 1999). Thus, when the enabling legislation contains specific direction, the Guidelines must be promulgated in keeping with that direction. *United States v. Nottingham*, 898 F. 2d 390, 393 (3rd Cir. 1990).

Where, as here, the Guidelines directly contravene a Congressional mandate to the agency, courts should invalidate the offending Guideline. *United States v. Chinn*, No. 95-5205, 1996 U.S. App. LEXIS 1545 at *2 (June 27, 1996 10th Cir.). Simply put, the Sentencing Commission "does not have the authority to override or amend a statute." *United States v. Novey*, 78 F.3d 1486, 1487 (10th Cir. 1996). Yet that is precisely what has happened here: Congress has mandated that sentences not result in disparity, and the Commission has promulgated Guidelines that stand in direct opposition to this clear command.

The Eleventh Circuit dismissed this important question of law in one terse paragraph. The Court conflated Mr. Goudie's challenge to the authority of the Commission to promulgate regulations in derogation of the express commands of Congress with his co-defendants

constitutional claims, and stated "[t]his argument is meritless." Pet. App. at 4a. The sole case cited by the Court of Appeals in support, *United States v. Erves*, 880 F.2d 376, 379 (11th Cir. 1989) addresses an argument that the Guidelines are unconstitutional. It does not deal with an argument that they violate the enabling statute. The Eleventh Circuit either misapprehended Mr. Goudie's argument, or failed to provide any support for its blanket rejection thereof.

The important issue of whether the Guidelines, when providing a clearly disproportionate sentence to a defendant, violate the permissible scope of the authority delegated by Congress to the Commission has never been considered by the Court. It is an important issue. It is squarely presented by the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 3, 2003

APPENDIX

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-10274

D. C. Docket No. 97-00582-1-CR-4-JAL

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ALEJANDRO DE LEON, a.k.a. Alex Lnu,
JOSE I. MACIA, JOHN N. GOUDIE,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(July 17, 2002)

Before TJOFLAT, COX AND MAGILL*, Circuit Judges.
PER CURIAM:

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*Honorable Frank J. Magill, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Jose I. Macia, Alejandro DeLeon, and John N. Goudie were convicted on multiple counts arising out of a mortgage-fraud and money-laundering conspiracy. They each raise several issues on appeal. We address each issue in turn.

Macia and De Leon each contend that the district court erred by failing to compel the Government to grant use immunity to a witness. Michael Shiffrin (Macia's witness) and Mary Ann Saumell (De Leon's witness) were both potential witnesses in the trial, and the Government informed both of them that they were targets of the Government's ongoing investigation into the mortgage fraud. Both Shiffrin and Saumell opted for Fifth Amendment protection rather than testify. This court has not decided whether the district court may grant use immunity despite the Government's refusal to do so, but we have said that, if the district court may grant use immunity, it may do so only in extraordinary cases where prosecutorial misconduct has occurred. *See United States v. Gottesman* 724 F.2d 1517, 1524 n.9 (11th Cir. 1984). The Government's informing Shiffrin and Saumell that they were investigative targets did not constitute misconduct. *See United States v. Fricke* 684 F.2d 1126, 1130 (5th Cir. 1982). Therefore, the district court did not err by refusing to grant use immunity to Shiffrin and Saumell.

Goudie contends that the evidence was insufficient to support his convictions for conspiracy to commit mortgage fraud and for the substantive offense of money laundering. A review of the record indicates that the evidence against Goudie was sufficient to sustain a conviction on the counts on which he was convicted. Goudie further contends, along with Macia, that the district court erred by denying a jury instruction on materiality. This error, if error, was harmless. *See*

United States v. Neder, 197 F.3d 1122, 1134 (11th Cir. 1999).

Goudie also contends that the district court abused its discretion by denying him a severance. Goudie contends that a severance was required so that Goudie could secure the exculpatory testimony of Macia. Goudie's initial motion for a severance came before trial and was denied because Goudie could not guarantee that Macia would testify on his behalf. Goudie renewed the request at the close of the Government's case, when it was clear that Macia would not testify in the joint trial. Goudie's proffer, however, was of questionable exculpatory value, and the district court did not abuse its discretion by denying the request for a severance. *See United States v. Novaton* 271 F.3d 968, 989-91 (11th Cir. 2001).

De Leon and Macia contend that the district court erred by grouping the money-laundering and bank-fraud counts pursuant to U.S.S.G. §3D1.2. The district court found that the fraud and the money laundering were integral cogs in the overall scheme, and this finding is not clearly erroneous. Therefore, the district court properly grouped these offenses under §3D1.2. *See United States* v. *Mullens* 65 F.3d 1560, 1564 (11th Cir. 1995).

Macia also contends that his sentence should not have been enhanced for a leadership role pursuant to U.S.S.G. §3B1.1(a). The district court's finding that Macia was a leader of the conspiracy is not clearly erroneous. *See United States v. Gallego* 247 F.3d 1191, 1201 n.21 (11th Cir. 2001).

In calculating Goudie's sentence, the district court found that Goudie was responsible for $661,000 of the fraud proceeds, and Goudie contends that this amount was too high. This amount was derived from the amount

of the mortgage ($234,000) that Goudie helped to secure with his verification of mortgage and from the amount of the transaction ($427,000) from which Goudie helped to launder funds. These amounts were reasonably foreseeable to Goudie and properly attributed to him. *See* U.S.S.G. §IB1.3.

Finally, all three defendants contend that their sentences are disproportionately long and, thus, a violation of due process or the Sentencing Reform Act. This argument is meritless. *See United States v. Erves* 880 F.2d 376, 379 (11th Cir. 1989).

The convictions and sentences of De Leon, Macia, and Goudie are affirmed.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-10274

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 10 2002
THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ALEJANDRO DE LEON, a.k.a. Alex Lnu,
JOSE I. MACIA, JOHN N. GOUDIE
Defendants-Appellants.

On Appeals from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19 __, _____F.2d _____).

Before: TJOFLAT, COX AND MAGILL*, Circuit Judges.

PER CURIAM:

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*Honorable Frank J. Magill, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.: 97-582-CR-LENARD

UNITED STATES OF AMERICA,
Plaintiff,

vs

JOHN GOUDIE,
Defendant.

ORDER GRANTING MOTION FOR BOND PENDING APPEAL AND INCREASING BOND

THIS CAUSE is before the Court on the Defendant John Goudie's Motion for Bond Pending Appeal, filed April 16, 1999, and Unopposed Motion to Change Conditions of the Appeal Bond, filed May 12, 1999 (seeking a modification of the increased bond of $350,000 Corporate Surety Bond set at the sentencing hearing on May 11, 1999). After careful consideration and being fully advised in the premises, the Court finds as follows.

III. Introduction

John Goudie was convicted along with two co-defendants after a lengthy jury trial on December 14, 1998 on two counts of money laundering (Counts 22 & 25), 18 U.S.C. §§ 1956(a)(1)(A)(i) & 1956(a) (l)(B) (i), one count of conspiracy to commit money laundering (Count

15), § 1956(h), and one count of conspiracy to commit bank fraud, mail fraud, wire fraud, and to make false statements to banks (Count 1), 18 U.S.C. §§ 2, 371, 1014, 1341, 1343 & 1344. At sentencing on April 19, 1999 the Court adopted the guideline applications recommended in Defendant's pre-sentence report. The Court then continued the sentencing hearing until May 11, 1999. Applying the applicable guidelines, Goudie was then sentenced on May 11, 1999 to a term of 60 months imprisonment.

IV. Discussion

Once convicted, the "conviction is presumed correct and the burden is on the convicted defendant to overcome that presumption." United States v. Giancola, 754 F.2d 898, 900-01 (11th Cir. 1985). The Eleventh Circuit has held a defendant must satisfy four factors before a district court may grant bond pending appeal: (1) that the defendant is not likely to flee or pose a danger to the community if released; (2) that the appeal is not for the purpose of delay; (3) that the appeal raises a substantial question of law or fact; and (4) that if the substantial question is determined favorably to the defendant on appeal, this decision is likely to result in a reversal or new trial of all counts. See id. at 901 (citations omitted).

The Court finds that Goudie has made an adequate showing under Giancola to warrant bond pending appeal. First, the Court finds that Goudie does not pose a risk of flight or danger to the community. After the jury verdict of guilty was handed down on December 14, 1998, Goudie moved for bond pending sentencing. At that time, the government did not oppose the motion, and agreed that Goudie did not pose a risk of flight or danger to the community. The Court granted the motion based in part on Goudie's demonstrated ties to the community, lack of criminal history, and the

government's admission that Goudie did not pose such a risk. Based on the record in this case, Goudie's ties to the community, his appearances throughout .the trial and the sentencing process, and his lack of criminal history, the Court finds Goudie does not pose a risk of flight or danger to the community.

Second, the Court finds that the evidence in favor of the conviction was weighty, but specifically finds that a substantial issue of law or fact has been raised that could lead to a reversal of all counts or result in a new trial for Goudie. This finding is primarily based on the U.S. Supreme Court's recent grant of the Petition for Writ of Certiorari in United States v. Neder, 136 F.3d 1459 (11th Cir.), cert. granted, 119 S. Ct. 334 (1998), to determine whether "materiality is an element of the crimes set forth in the federal mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343) and bank fraud (18 U.S.C. § 1344) statutes." 119 S. Ct. at 334. During the trial in this case, the Court denied Goudie's request to include a jury instruction incorporating materiality as an element of the fraud offenses. (See Tr. at 5568-70.) Although the Court's ruling was consistent with Eleventh Circuit case law at the time of trial based on the Neder decision, the Supreme Court's grant of certiorari presents a substantial issue of law in this particular case. The Court emphasizes that this finding is specific to the particular case against John Goudie and the particular evidence presented demonstrating Goudie's guilt. The Court finds, however, that there is a substantial issue of law as to the sufficiency of the evidence of Goudie's guilt. Thus, the Court finds this issue is not frivolous and is a close question that could well be decided the other way. See Giancola, 754 F.2d at 901.

Therefore, the Court shall grant the motion, subject to specific conditions as set forth below.

V. Conclusion – Terms And Conditions Of Bond

Based on the forgoing, it is **ORDERED AND ADJUDGED** that Goudie's Motion for Bond Pending Appeal, filed May 11, 1999 is **GRANTED**, as follows:

In addition to the previously imposed bonds of $100,000 Personal Surety, $100,000 Personal Surety with 10% deposited into the Registry of the Court and $350,000 Personal Surety, co-signed by 1) Joseph Goudie, 2) Carelina Goudie, 3) Diana Goudie, 4) Irene Souto and 5) Mary Lou Goudie; the Defendant shall post an additional $550,000 Personal Surety Bond with 10% to be deposited into the Registry of the Court. The $550,000 ten percent bond shall be co-signed by the following sureties: 1) James Goudie, 2) Joseph Goudie, 3) Carelina Goudie, 4) Diana Goudie, 5) Irene Souto, 6) Mary Lou Goudie, 7) Lyan Goudie and 8) Jack Goudie.

All previously imposed standard and special conditions (not modified by this Order) shall remain in full force and effect, however, this Court also imposes the following special conditions:

1. the defendant shall continue to wear an electronic monitoring device and follow the electronic monitoring procedures specified by the U.S. Pretrial Services Office and/or the U.S. Probation Office. In addition, the defendant shall pay for the cost of the electronic monitoring at a rate of $4.55 per day;

2. the defendant shall remain at his place of residence except activities approved in advance by the U.S. Pretrial Services Office, and shall comply with curfew hours

of 10:00 p.m. to 7:00 a.m., seven days a week;

3. the defendant shall maintain a telephone at his place of residence without "call forwarding," "call waiting," a modem, "caller ID," or "call back/call block" services;

4. the defendant's travel is restricted to the Southern District of Florida;

5. the defendant shall report to the U.S. Pretrial Services Office once a week by phone and once a week in person;

6. the properties of the defendant and the co-signors/sureties shall be used as collateral to secure the all four bonds;

7. the defendant and the co-signors/sureties shall not further encumber or sell their properties, unless for the purposes of attorney fees relating to this case.

It is further **ORDER AND ADJUDGED** that the increased $550,000 ten percent bond shall be posted by 4:30 p.m. on May 17, 1999. In addition, all other conditions stated herein shall be complied with by May 17, 1999 at 4:30pm. Failure to comply with this Order shall result in the remand of the Defendant.

DONE AND ORDERED in Chambers at Miami, Florida, this 17th day of May, 1999.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

APPENDIX D

§ 991. United States Sentencing Commission; establishment and purposes

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney General's designee, shall be an ex-officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to-

(1) establish sentencing policies and practices for the Federal criminal justice system that-

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding, unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

(Added Pub. L. 98-473, title II, §217(a), Oct. 12, 1984, 98 Stat. 2017; amended Pub. L. 99-22, §1(1), Apr. 15, 1985, 99 Stat. 46; Pub. L. 103-322, title XXVIII, §280005(a), (c)(1), (2); Sept. 13, 1994, 108 Stat. 2096, 2097; Pub. L. 104-294, title VI, §604(b)(11), Oct. 11, 1996, 110 Stat. 3507.)

VI. § 992. Terms of office; compensation

(a) The voting members of the United States Sentencing Commission shall be appointed for six-year terms, except that the initial terms of the first members of the Commission shall be staggered so that-

(1) two members, including the Chair, serve terms of six years;

(2) three members serve terms of four years; and

(3) two members serve terms of two years.

(b)(1) Subject to paragraph (2)-

(A) no voting member of the Commission may serve more than two full terms; and

(B) a voting member appointed to fill a vacancy that occurs before the expiration of the term for which a predecessor was appointed shall be appointed only for the remainder of such term.

(2) A voting member of the Commission whose term has expired may continue to serve until the earlier of-

(A) the date on which a successor has taken office; or

(B) the date on which the Congress adjourns sine die to end the session of Congress that commences after the date on which the member's term expired.

(c) The Chair and Vice Chairs of the Commission shall hold full-time positions and shall be compensated during their terms of office at the annual rate at which judges of the United States courts of appeals are compensated. The voting members of the Commission, other than the Chair and Vice Chairs, shall hold full-time positions until the end of the first six years after the sentencing guidelines go into effect pursuant to section 235(a)(1)(B)(ii) of the Sentencing Reform Act of 1984, and shall be compensated at the annual rate at which judges of the United States courts of appeals are compensated. Thereafter, the voting members of the Commission, other than the Chair and Vice Chairs,,[10] shall hold part-time positions and shall be paid at the daily rate at which judges of the United States courts of appeals are compensated. A Federal judge may serve as a member of the Commission without resigning the judge's appointment as a Federal judge.

(d) Sections 44(c) and 134(b) of this title (relating to the residence of judges) do not apply to any judge holding a full-time position on the Commission under subsection (c) of this section.

(Added Pub: L. 98-473, title II, §217(a), Oct. 12, 1984, 98 Stat. 2018; amended Pub. L. 99-646, §§4, 6(a), Nov. 10, 1986, 100 Stat. 3592; Pub. L. 102-349, §1, Aug. 26, 1992, 106 Stat. 933; Pub. L. 103-322, title XXVIII, §280005(b), (c)(1), (3), Sept. 13, 1994, 108 Stat. 2096, 2097.)

VII. § 993. Powers and duties of Chair

The Chair shall-

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[10] So in original.

(a) call and preside at meetings of the Commission, which shall be held for at least two weeks in each quarter after the members of the Commission hold part-time positions; and

(b) direct-

(1) the preparation of requests for appropriations for the Commission; and

(2) the use of funds made available to the Commission.

(Added Pub. L. 98-473, title II, §217(a), Oct. 12, 1984, 98 Stat. 2019; amended Pub. L. 99-22, §1(2), Apr. 15, 1985, 99 Stat. 46; Pub. L. 99-646, §5, Nov. 10, 1986, 100 Stat. 3592; Pub. L. 103-322, title XXVIII, §280005(c)(1), Sept. 13, 1994, 108 Stat. 2097.)

VIII. § 994. Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System-

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including-

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11)[11] of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of-

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

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[11] See References in Text note below.

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that,

if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents[12] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance-

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused. by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

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[12] So in original. Probably should be "incidence".

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents[3] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance-

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated

pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and-

(1) has been convicted of a felony that is-

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.); and

(2) has previously been convicted of two or more prior felonies, each of which is-

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant-

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three are more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of

imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect-

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of-

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such

communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including-

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in-

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable

to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w) The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed posed (other than a sentence imposed for a petty offense, as defined in title 18, for which there is no applicable sentencing guideline) a written report of the sentence, the offense for which it its imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendations for legislation that the Commission concludes is warranted by that analysis.

(x) The provisions of section 533 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

(Added Pub. L. 98-473, title II, §217(a), Oct. 12, 1984, 98 Stat. 2019; amended Pub. L. 99-217, §3, Dec. 26, 1985, 99 Stat. 1728; Pub. L. 99-363, §2, July 11, 1986, 100 Stat. 770; Pub. L. 99-570, title I, §§1006(b), 1008, Oct. 27, 1986, 100 Stat. 3207-7; Pub. L. 99-646, §§6(b), 56, Nov. 10, 1986, 100 Stat. 3592, 3611; Pub. L. 100-182, §§16(b), 23, Dec. 7, 1987, 101 Stat. 1269, 1271; Pub. L. 100-690, title VII, §§7083, 7103(b), 7109, Nov. 18, 1988, 102 Stat. 4408, 4417, 4419; Pub. L. 103-322, title II, §20403(b), title XXVIII, §280005(c)(4), title XXXIII, §330003(f)(1), Sept. 13, 1994, 108 Stat. 1825, 2097, 2141.)